PUBLIC PROSECUTOR v. HOAY LEAN HOCK

[R.Cr.J. (Ong Hock Sim J.) February 24, 1968]
[Penang — Criminal Revision No. 1 of 1968]

Criminal Law and Procedure — Juvenile Offender — Curfew breaking committed jointly with others including adults — Probation report — Juvenile Courts Ordinance, 1947, s. 28, 39.

The respondent aged 16 was charged with seven others whose ages ranged between 19 and 28 with the offence of curfew breaking. The respondent along with the other accused pleaded guilty to the charge. The others were duly convicted and sentenced to 3 months imprisonment. Because of the respondent's age, the magistrate sent for a probation report on him, after reading which the magistrate made an order under section 39 of the Juvenile Courts Ordinance for him to be detained in the Henry Gurney School for a period of 3 years.

Held: (1) a probation report is not necessary where punishment for the offence is not a long term;

(2) in this case the respondent should have been put on bond and his mother allowed to stand surety;

(3) in the circumstances of the case the order of the magistrate should be set aside.

Cases referred to:—

(1) *Ong Ah Thoo* v. *R.* [1949] M.L.J. 36.

(2) *Tukiran bin Taib* v. *Public Prosecutor* [1955] M.L.J. 24.

(3) *Abu Bakar bin Ariff* v. *R.* [1953] M.L.J. 19.

(4) *Yap Tan Lim* v. *R.* (1930) 2 M.C. 119.

CRIMINAL REVISION.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the Public Prosecutor.

David Choong for the respondent.

Ong Hock Sim J.: The respondent was ordered to be brought back from the Henry Gurney School in order that I may revise his case which has come to my attention indirectly out of an application by his counsel for extension of time to file a petition of appeal.

The respondent aged 16 years was charged with seven other persons whose ages ranged between 19 and 28 with the following offence:—

"That you jointly on 25.11.67 at about 3.30 p.m. at Brck Kiln Road in the District of George Town in the State of Penang, an area proclaimed under the Public Order (Preservation) Ordinance 1958, by the Chief Police Officer, Penang, requiring every person to remain within doors as from 7.15 p.m. on 24.11.67 till 7.15 p.m. on 25.11.67, failed to comply with such order, to wit, you were found on the public road without a permit issued in that behalf by a police officer of the rank of a sub-inspector and that you have thereby committed an offence under section 7 and punishable under section 27 of the Public Order (Preservation) Ordinance No. 46 of 1958."

In his grounds of judgment the learned magistrate said:—

"The juvenile offender admitted the offence as also did the other seven accused who pleaded guilty to the charge. The prosecuting officer stated that the juvenile offender and the seven accused charged with him were seen together in front of the Wembley Theatre. The juvenile offender along with the seven accused admitted these facts."

The seven others were duly convicted by the learned magistrate and sentenced to 3 months imprisonment. Because of his age the learned magistrate sent for a probation report, after reading which he made an order pursuant to section 39 of the Juvenile Courts Ordinance for him to be detained in the Henry Gurney School for a period of 3 years.

The magistrate in his grounds of judgment at page 2 has stated that "the offender now appeals against both his conviction and his sentence" which clearly is incorrect as upon a plea of guilty it is expressly provided under section 299 of the Criminal Procedure Code that there is no appeal except as to the extent or legality of the sentence.

I have outlined the facts and the punishment which has been imposed on the others who were in the same situation as the respondent and I am sure one would like to know what reason there could be for this undue disparity and discrimination in regard to the sentence when upon the facts as given by the prosecuting officer there were no aggravating matters or factors disclosed. As recorded by the learned magistrate "I enquired from the offender his occupation and he stated that he was a mason" and therefore the respondent was at the time gainfully employed. The offence under which he was convicted is an offence punishable with a maximum of six months imprisonment. I shall only read a part of it:—

"If any person contravenes or fails to comply with any provision of this Ordinance or any order or direction made . . . . he shall be guilty of an offence . . . ., and shall be liable to imprisonment for a term of six months or to a fine of five hundred dollars and to both such imprisonment and fine."

From his grounds of judgment the learned magistrate has this to say of his reading of this particular section:—

"The maximum punishment for the offence in this case is laid down under section 27 of the Public Order (Preservation) Ordinance No. 46 of 1958 as six months' imprisonment or a fine of $500 or both such imprisonment and fine. In this section, as worded, the punishment of imprisonment precedes the punishment of fine, which is only shown as an alternative to the punishment of imprisonment. In this respect the punishable section differs from many other punishable provisions in statutes which state the punishment of fine as the primary punishment with imprisonment as an alternative. It is clear, therefore, that the legislature has intended that imprisonment without the option of a fine can be imposed in appropriate cases as punishment for offences punishable under the said section 27."

This is something out of the blue. I have not been able to recall a law which has prescribed that an offender shall be liable to fine or imprisonment or both. It is clear that the magistrate has misdirected himself. The wording of the

section was never intended to interfere with the discretion of the court to decide whether upon the facts disclosed, the sentence ought to be one of imprisonment rather than the alternative of fine. The learned magistrate has therefore found himself compelled by his own misconception of the law to impose a sentence of imprisonment for curfew breakers, particularly as he had taken into consideration other extraneous factors as to the age group and the occupations of persons who are charged before him, believing that the labouring classes and the labour party were responsible for bringing about the imposition of the curfew. The court should concern itself only with the facts presented before it and the circumstances surrounding the offence and while it may have regard also to other surrounding circumstances it should refrain from drawing only adverse inferences against the persons charged. It is seen from the record that all we have is:

"The probation officer submits: probation report (Ex. P.1)". Now we have the case of *Ong Ah Thoo* v. *Rex.*[1] in which Murray-Aynsley C.J. stated:—

"There seems to have been some doubt in the mind of the learned magistrate as to the proper method of bringing in the report of the probation officer. I think that the right way is for the probation officer to be called as a witness and to give the substance of the report as evidence. This is done by police officers who are able to furnish valuable reports in all criminal cases which are of great assistance to judges when it comes to passing sentence."

There is ample authority that antecedents of offenders should be given for the assessing of sentence and Bellamy J. in *Tukiran bin Taib* v. *Public Prosecutor* [2] stated:—

". . . . before passing sentence magistrates should first make careful inquiries 'regarding the background, antecedents and character' of the convicted person, (See *Abu Bakar bin Ariff* v. *R.*[3]) and this is particularly of importance when the convicted person is a young offender and it is contemplated imposing a sentence of imprisonment."

A probation officer's report in my view is hardly called for unless it is intended to send the offender to prison and in this case I should have thought that his comparative youth should be in his favour, considering the others were only given 3 months. A probation report is hardly necessary where punishment for the offence is not a long term. The prime consideration before the court, he says, in imposing punishment in this case would, quite clearly, have to be the public interest, both the immediate and the long-term and larger public interest.

The learned magistrate in his grounds of judgment said:—

"The salient features as to the circumstances of the offender which were brought to light by the probation report were as follows:—

(a) He left school 3 years ago as he was not keen to continue his studies.

(b) He had no recreational activities.

(c) His friends were building labourers, some of whom were from the Noordin Street and Presgrave Street area. (This is the same area in which the present offence was committed. Two of the other seven co-accused in this case were also building labourers).

(d) He is at present employed as a building labourer. He earns his own pocket money and does not depend on his parents. His employer is prepared to continue to employ him.

(e) Offender was charged for committing an offence of voluntarily causing grievous hurt at Presgrave Street (same area where present offence was committed) under section 325 of the Penal Code in 1965. The case was compounded in November, 1965.

(f) About a year later, the offender's mother reported him to the probation office as being beyond her control, and he was placed on voluntary supervision by the probation office.

(g) The offender was a member of a secret society gang.

(h) The offender's mother was prepared to stand surety for the accused's good behaviour, but the probation officer was of the clear opinion that she would be unable to exercise sufficient control over him, and the offender appeared to be in need of stricter discipline than he could get at home."

Now clearly a report of this nature instead of trying to assist a juvenile becomes damaging to him so far as the court is concerned. An adult offender under the law would not have facts given by the police officers as to his previous antecedents admitted where the allegations or matters are not capable of proof or rests upon hearsay or inadmissible evidence. In this case the respondent did not know what had been submitted to the learned magistrate. He was not asked whether he admitted it. The probation report was not read out to him and obviously the magistrate had considered it in punishing him for being a member of the secret society. In this connection I would refer to the case of *Yap Tan Lim* v. *Rex* [4] where Thorne J. said (pp. 124 and 125):—

"It is desirable in all cases where a statement is made to the court by the officer in charge of the prosecution after a plea of guilty has been recorded that such statement should be put to the convicted person in order that he may have an opportunity of admitting or denying the allegation or possibly offering some explanation. In every instance in which the statement thus made is prejudicial to the convicted person, it is essential that this should be done. If the convicted person admits the facts the court may act upon his admission, but if the convicted person does not admit or desires to qualify the statement in any way, the court can inform itself of the facts of the case by the only method available to the Courts of Justice in this Colony, namely by evidence which is admissible under the provisions of the Evidence Ordinance or other statutory rule such as that regulating the proof of previous conviction. Under no circumstances should a statement of opinion or suspicion held or entertained by a police officer be made to a magistrate in such a case."

Sproule J. enunciated a few rules which should govern the practice, where after conviction,

whether based upon trial or upon an accepted plea of guilty, the court invites assistance from the prosecution to enable him to assess the penalty. He said (pp. 121 and 122):—

"The court is entitled to such assistance from the prosecution. The prosecution should state all it knows, believes or can honestly argue or plead in favour of the accused. Nothing should be alleged by the prosecution against the interests of the accused which cannot be substantiated. If there is any suspicion against the accused which the prosecution believes may be proved after investigation, a postponement should be asked for without the suspicion being enunciated. No matter of suspicion against the accused should be enunciated, only matters of known fact or argument arising out of proved facts. Every matter of fact or argument so adduced against the accused must be explained to the accused. The accused must be given an opportunity of meeting argument with argument. The accused must be given an opportunity of admitting or challenging any new fact so alleged against him. If the accused challenges any such fact, the prosecution may withdraw its allegation, which the court must then hold to be baseless. If the prosecution takes up the accused's challenge, then the issue should be tried and decided according to the rules of evidence and procedure provided by law, after postponement in favour of either side, if necessary, any reasonable doubt moveover being always solved in favour of the accused."

The probation report contains some very interesting matters as follows:—

"Since 1965 the lad has been engaged as a daily paid mosaic worker under a Kepala, Enche' Ch'ng Chow Huat who lives at 150, Noording Street, Penang. At the time of his arrest he was still working under Enche' Ch'ng.

Enche' Ch'ng Chow Huat the lad's employer was interviewed on 7.12.67 and he said that he has found the lad to be a conscientious worker and he has nothing bad to say about him. He is prepared to employ him again, if the lad is given a chance by the court. The mother is prepared to stand surety for his future good behaviour. She also promises to exercise stricter control over the lad to keep him away out of trouble."

Instead the learned magistrate chose to act solely upon the opinion of the probation officer which I think he ought not to have given where he says:—

"Although the mother would like to stand surety for his good behaviour, she would be unable to exercise sufficient control over him. The offender does appear to be in need of stricter discipline than he can get at home."

In my view the magistrate should have put him on bond and allowed the mother to stand surety and if there is a breach then he could be brought back to be dealt with.

In the circumstances therefore I have no hesitation whatsoever in setting aside the order for detention in the Henry Gurney School.

I may add that when the learned magistrate stated in his grounds of judgment that "by virtue of the proviso to section 28(b) of the Juvenile Courts Ordinance, 1947 the Commissioner of Prisons can, in his absolute discretion, shorten the period of detention for reasons which appear to him to be sufficient or may release the young person on licence for such period and upon such conditions as he may deem fit to impose" his imposition of 3 years detention of the juvenile shows that he has shirked responsibility to decide how to deal with the offender on the facts presented to him. The offender should be punished for his offence in accordance with the law and he should not be made to suffer a longer period of detention solely because it is thought that he needed disciplining. Unless he behaves himself, I imagine, he would have to undergo disciplinary punishment in the Henry Gurney School and this obviously would tend to induce the boy to practice deception for the purposes of shortening his period of detention. It is not known and I certainly do not see why in a case of this sort a lad who is earning his livelihood, who was not armed and who was not shown to have committed any damage or other act of violence during the riots should be unduly penalised because of his age.

One other observation, it is abundantly clear that the learned magistrate in making the order was acting outside his jurisdiction. It is competent only for a Juvenile Court to make the order he did and he was then acting in his capacity of magistrate.

Order of detention set aside.

Solicitors: *Lim, Lim & Oon.*

CHUA KAH WEE & ORS. v. CHUA GEOK ENG

[O.C.J. (Chua J.) May 31, 1968]
[Singapore — Suit No. 823 of 1965]

Trusts and Trustees — Express trust — Property conveyed by father to 4 children absolutely — Verbal request that they should hold the property for the father for life with remainder to themselves and six other children — Title deeds held by father — Purchase price paid by father — Defendant (one of the 4 children) denied that she was a trustee and claimed that she was absolutely entitled to ¼ share on the ground that the father had allowed her to purchase the property below its market value and that she had so purchased it — Document relied on by defendant as evidence of purchase held a forgery — Alleged illegality of purpose.

The plaintiffs, who were the first two registered owners and the administrator of the third registered owner, of a piece of land, claimed against the defendant, the fourth registered owner, a declaration that the defendant held the property on trust for their father for life with remainder to his ten children or their estates as tenants in common absolutely. The court found that in 1953 the father of the four registered owners conveyed the property to them, having previously verbally requested them to hold the property for himself for life and after his death for themselves and his six other children; that the defendant accepted the trust, that the father retained the title deeds, enjoyed the rents and paid the outgoings and that the property had been voluntarily mortgaged twice by the plaintiffs and by the defendant at the request of the father and for his benefit. The defendant claimed ¼ share of the property absolutely and alleged that she had been permitted by the father to purchase the property at below its market value, and produced a document which was signed by